

1
2
3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT SEATTLE

6 TOP NOTCH SOLUTIONS, INC., et al.,

7 Plaintiffs,

8 v.

9 CROUSE AND ASSOCIATES
10 INSURANCE BROKERS, INC., et al.,

11 Defendants.

C17-827 TSZ

ORDER

12 THIS MATTER comes before the Court on a praecipe filed by plaintiffs, docket
13 no. 92, which sought to correct “errors” in the Fourth Amended Complaint, and which
14 was treated as a motion for leave to file a fifth amended complaint. See Minute Order
15 (docket no. 93). After defendants Crouse and Associates Insurance Brokers, Inc.
16 (“Crouse”) and McGriff, Seibels & Williams Inc. (“McGriff”) filed responses, docket
17 nos. 95 and 96, respectively, asking the Court to strike any claims being made under
18 Sections 1 and 2 of the Sherman Act and/or plaintiffs’ Fourth Amended Complaint,
19 docket no. 90, plaintiffs filed a reply, docket no. 97, improperly noted as a motion to
20 amend, and another praecipe, docket no. 98, attached to which was a proposed Fifth
21 Amended Complaint. Having reviewed plaintiffs’ proposed pleadings and all of the
22 papers filed in support of and in opposition to plaintiffs’ request for leave to amend, the
23 Court enters the following order.

1 **Background**

2 When plaintiffs commenced this action, they named as defendants (i) Crouse,
3 (ii) Pucin & Freidland, P.C. (“Pucin”), and (iii) Jane/John Doe 1-50. See Compl. (docket
4 no. 1-1). Plaintiffs sought and were granted leave to amend their pleading. See Minute
5 Order (docket no. 25). An Amended Complaint, docket no. 26, was filed on July 28,
6 2017. On motions brought by Crouse and Pucin, portions of the Amended Complaint
7 were dismissed, in part with prejudice and in part without prejudice. See Order (docket
8 no. 38). Plaintiffs were granted leave to amend, and they filed their Second Amended
9 Complaint, docket no. 40, on November 28, 2017.

10 Plaintiffs sought and were granted leave to amend yet again, and they filed their
11 Third Amended Complaint, docket no. 50, on December 26, 2017, adding McGriff as a
12 defendant. Crouse and Pucin filed answers to the Third Amended Complaint, see
13 Answers (docket nos. 59 & 73), but McGriff moved to dismiss certain claims set forth in
14 that pleading. The Court granted McGriff’s motion in part and dismissed without
15 prejudice and with leave to amend certain antitrust claims brought under Washington’s
16 Consumer Protection Act (“CPA”), specifically RCW 19.86.030 and .040. See Order
17 (docket no. 86).

18 In the meanwhile, plaintiffs had again asked for leave to amend their pleading,
19 seeking to join as a defendant National Casualty Company. Their motion was denied by
20 Minute Order entered June 29, 2018, docket no. 89, and a deadline was set for plaintiffs
21 to electronically file an amended pleading consistent with the Order ruling on McGriff’s
22 partial motion to dismiss. Plaintiffs filed their Fourth Amended Complaint, docket
23

no. 90, on July 26, 2018, alleging for the first time, against both Crouse and McGriff, a violation of Section 2 of the Sherman Act. See id. at ¶ 4.6.7. Before the deadline for McGriff to file a responsive pleading or motion, plaintiffs filed the praecipe at issue that has been treated as a motion for leave to file a fifth amended complaint. See Praecipe (docket no. 92).

The proposed Substitute Fourth Amended Complaint, which was attached to the praecipe, pleads for the first time a violation of Section 1 of the Sherman Act. See Prop. Substitute 4th Am. Compl. at ¶ 4.6.7 (docket no. 92-1). This claim is alleged against both Crouse and McGriff. See id. The claims under Sections 1 and 2 of the Sherman Act, against Crouse and McGriff, also appear in plaintiffs' revised proposed pleading, captioned as the Fifth Amended Complaint, docket no. 98-1, which was attached to the praecipe filed contemporaneously with plaintiffs' reply (and improperly noted motion to amend).

Discussion

A. Motion Practice

Plaintiffs and their counsel are hereby DIRECTED not to file any more praecipes in connection with their pleadings. A pleading may not be "corrected" or amended via praecipe, and plaintiffs' attorney has created confusion and unnecessarily complicated the record in this matter by attempting to circumvent the requirement of a formal motion to obtain the relief she seeks on behalf of her clients, namely leave to amend a pleading. Plaintiffs and their lawyer are also ADVISED that further breaches of the Court's rules concerning the manner in which motions are to be filed and noted will not be tolerated.

1 A reply brief may not contain a new motion, other than one to strike materials in, or
2 submitted with, a response, see Local Civil Rule 7(g), and all motions must be noted in
3 accordance with Local Civil Rule 7(d). If plaintiffs' counsel continues not to abide by
4 the Court's rules, the Court will consider imposing sanctions, including requiring counsel
5 to attend training and/or a monetary penalty.

6 **B. Standard for Amending Pleadings**

7 The liberal rules regarding the amendment of pleadings indicate that the Court
8 should "freely" grant leave to amend "when justice so requires." Fed. R. Civ. P. 15(a)(2).
9 In deciding whether to grant leave to amend, the Court must consider the following
10 factors: (i) whether the apparent or declared reason for seeking to amend is undue delay,
11 bad faith, or dilatory motive; (ii) whether the movant has repeatedly failed to cure
12 deficiencies by amendments previously allowed; (iii) whether the opposing party will be
13 unduly prejudiced if leave to amend is given; and (iv) whether the proposed amendment
14 is futile. See Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1051-52 (9th Cir.
15 2003) (quoting Foman v. Davis, 371 U.S. 178, 182 (1962)). Not all of the factors merit
16 equal weight; rather, prejudice to the opposing party is the "touchstone" of the inquiry
17 under Rule 15(a)(2). Id. at 1052. Absent prejudice or a strong showing with respect to at
18 least one of the remaining factors, leave to amend should be granted. Id.

19 Crouse and McGriff complain that, in asserting a claim under Section 2 of the
20 Sherman Act, the Fourth Amended Complaint (which is currently the operative pleading)
21 went beyond the scope of the leave to amend granted by the Court in its Order entered
22 May 30, 2018, docket no. 86, and subsequent Minute Order entered June 29, 2018,
23

1 docket no. 89. Defendants might be correct, but plaintiffs now have a pending motion for
2 leave to amend, and the question before the Court is not whether the Fourth Amended
3 Complaint was consistent with the Court’s earlier rulings, but rather whether plaintiffs
4 should be allowed to file either their Substitute Fourth Amended Complaint or their Fifth
5 Amended Complaint, alleging new claims under both Sections 1 and 2 of the Sherman
6 Act.¹ Because one of the factors relevant to a Rule 15(a)(2) motion is whether the
7 proposed amendment is futile, the threshold question is whether the proposed revised
8 pleading adequately states claims under Sections 1 and 2 of the Sherman Act.

9 **C. Sherman Act**

10 Section 1 of the Sherman Act provides in relevant part:

11 Every contract, combination in the form of trust or otherwise, or
12 conspiracy, in restraint of trade or commerce *among the several States*, or
with foreign nations, is declared to be illegal.

13 15 U.S.C. § 1 (emphasis added). Section 2 of the Sherman Act reads in part:

14 Every person who shall monopolize, or attempt to monopolize, or combine
15 or conspire with any other person or persons, to monopolize any part of the
trade or commerce *among the several States*, or with foreign nations, shall
16 be deemed guilty of a felony

17 15 U.S.C. § 2 (emphasis added). To proceed under Sections 1 and/or 2 of the Sherman
18 Act, a plaintiff must allege that the challenged activity is “in” or has an “effect on”

19 ¹ Whether plaintiffs cured (or might cure), in their Fourth Amended Complaint, docket no. 90,
20 which plaintiffs were granted leave to file, or in their proposed Substitute Fourth Amended
21 Complaint, docket no. 92-1, or proposed Fifth Amended Complaint, docket no. 98-1, the
22 deficiencies of their previous pleadings with respect to their state law antitrust claims is not
23 currently before the Court. Crouse and McGriff contest only plaintiffs’ ability to proceed
forward on Sherman Act, as opposed to CPA-based, restraint-of-trade and/or monopolization
claims.

1 interstate commerce. See *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232,
2 241-42 (1980). A plaintiff may not rely merely on the “identification of a relevant local
3 activity” and a presumption that such activity has “an interrelationship with some
4 unspecified aspect of interstate commerce,” but rather must plead in the complaint “the
5 critical relationship,” describing how the local activity “has an effect on some other
6 appreciable activity demonstrably in interstate commerce.” *Id.* at 242. Plaintiffs’
7 proposed Substitute Fourth Amended Complaint and Fifth Amended Complaint fail to
8 indicate how the alleged conduct of Crouse and McGriff was “in” or had an “effect on”
9 interstate commerce.

10 To the contrary, the proposed pleadings discuss a taxi and for-hire industry and an
11 insurance industry that are heavily regulated by the State of Washington and/or its
12 counties and municipalities. See Prop. Substitute 4th Am. Compl. & Prop. 5th Am.
13 Compl. at ¶ 3.1 (docket nos. 92-1 & 98-1). The proposed pleadings further indicate that
14 the extent of any anticompetitive behavior in which Crouse and/or McGriff engaged was
15 limited to the Western Washington and Greater Seattle region. *Id.* at ¶¶ 3.3.25, 3.3.28,
16 3.4.1, 3.4.3, & 3.4.9. The crux of plaintiffs’ antitrust claims is that the International
17 Brotherhood of Teamsters Local 117 created the Western Washington Taxicab Operators
18 Association (“WWTCOA”), which encouraged taxi and for-hire drivers to join for \$25.00
19 per month and then to purchase liability insurance exclusively through McGriff, which in
20 collusion with Crouse managed to divert all business away from plaintiffs and other local
21 insurance brokers. See id. at §§ 3.3 & 3.4. The proposed pleadings make no assertion
22 that any of the steps taken by Crouse and/or McGriff to consolidate how insurance
23

1 products were procured in the local area had any “effect on” interstate commerce. The
2 Court is persuaded that plaintiffs could not, in an amended pleading, allege the requisite
3 relationship between the local activity at issue and interstate commerce, and that
4 plaintiffs’ attempt to add claims under Sections 1 and 2 of the Sherman Act is futile. The
5 Court need not and does not address the other Rule 15(a)(2) factors.

6 **Conclusion**

7 For the foregoing reasons, the Court ORDERS as follows:

8 (1) Plaintiffs’ motion, docket no. 92, for leave to file the proposed Substitute
9 Fourth Amended Complaint, docket no. 92-1, is GRANTED in part and DENIED in part.
10 The Fourth Amended Complaint, docket no. 90, shall remain the operative pleading, but
11 it is hereby deemed corrected in the manner set forth in the Praecipe filed July 31, 2018,
12 docket no. 92, on Page 2 at Lines 5-12. The proposed change described in the Praecipe
13 on Page 2 at Lines 13-14 (substituting “Sections 1 and 2” for “Section 2” of the Sherman
14 Act) is not permitted. Moreover, any claim made in the Fourth Amended Complaint,
15 docket no. 90, pursuant to the Sherman Act is hereby STRICKEN.

16 (2) Plaintiffs’ motion, docket no. 97, for leave to file the proposed Fifth
17 Amended Complaint, docket no. 98-1, is DENIED.

18 (3) Any motion or pleading responsive to the Fourth Amended Complaint,
19 docket no. 90, as hereby amended, shall be filed within fourteen (14) days of the date of
20 this Order. To accommodate plaintiffs’ counsel’s health status, any responsive motion
21 shall be noted on or after November 16, 2018. Upon the agreement of all counsel, the
22
23

1 movant may, without an order of the Court, renege any such motion to allow plaintiffs'
2 counsel additional time to recover from surgery and prepare a response to the motion.

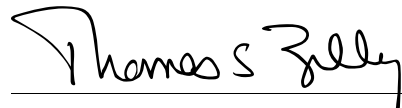
3 (4) Plaintiffs are DIRECTED to show cause by November 16, 2018, why their
4 claims against defendants Jane/John Doe 2-50 should not be dismissed for failure to
5 prosecute, the deadline for joining parties having expired on May 14, 2018.

6 (5) On or before November 16, 2018, the parties shall file a Joint Statement
7 concerning subject-matter jurisdiction, setting forth the states in which each corporate
8 party is organized and has its principal place of business, and the state in which each
9 individual party resides or is a citizen.

10 (6) The parties' stipulated motion for stay and to continue the trial date, docket
11 no. 100, is DENIED in part and GRANTED in part as follows. The request for a 30-day
12 stay is DENIED. The trial date of April 29, 2019, and the remaining related dates and
13 deadlines are STRICKEN. On or before November 16, 2018, the parties shall confer and
14 file a Joint Status Report concerning plaintiffs' counsel's health condition and, if
15 appropriate, setting forth proposed dates for completing discovery, filing any dispositive
16 motions, and commencing trial.

17 (7) The Clerk is directed to send a copy of this Order to all counsel of record.

18 Dated this 15th day of October, 2018.

19 

20 Thomas S. Zilly
21 United States District Judge
22
23